(5)

No. 94-1819

Supreme Court, U.S.
FILED
JUN 12 1995
CLERK

IN THE

Supreme Court of the United States

October Term, 1994

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN and JEFFREY LUKS,

Petitioners,

against

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees, and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC.

VICTORIA A. GRAFFEO
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

Of Counsel

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Respondents
The Capitol
Albany, NY 12224
(518) 473-0903

Dated: June 12, 1995

THE REPORTER CO., INC.- Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264

(1114 – 1995)

Printed on Recycled Paper

BEST AVAILABLE COPY

Table of Contents

Table of Authorities ii

Statement of the Case 2

Reasons for Denying the Motion 2

Conclusion 4

TABLE OF AUTHORITIES

Pages

STATUTES:

42 U.S.C. § 1988 3

42 U.S.C. § 1983 3

Fed R Civ P 15 3

No. 94-1819

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

TODD FOX, EDWARD R. DETWEILER, STEPHANIE VAIANO, JAMES B. CULLEN, CHRISTINE MARIE ODELL, STEVEN GAWLEY, DANIEL ALTMAN, PHILIP JAY BOTWINIK, JEFFREY S. ZELLAN, JACLYN BERNSTEIN, GLEN MAGPANTAY, WILLIAM WEITZ, COREY ANTHONY, DIEGO MUNOZ, EDWARD FAGAN, BAYCAN FIDELI, JODIE GREEN AND JEFFREY LUKS,

Petitioners,

- against -

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, and CLIFTON R. WHARTON, JR., individually and as Chancellor of the Board of Trustees, and THE STATE UNIVERSITY OF NEW YORK COLLEGE AT CORTLAND, and JAMES M. CLARK, individually and as President of the College at Cortland, and THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, and CLIFFORD D. CLARK, individually and as President of the State University of New York at Binghamton, and THE STATE UNIVERSITY OF NEW YORK AT ALBANY, and VINCENT O'LEARY, individually and as President of the State University of New York at Albany, and THE STATE UNIVERSITY OF NEW YORK COLLEGE OF ARTS AND SCIENCES AT POTSDAM, and HUMPHREY TOMKIN, individually and as President of the College of Arts and Sciences at Potsdam,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC.

Statement of the Case

The facts of the case are discussed in the Brief of Respondents in Opposition to Petition for a Writ of Certiorari at pages 2 through 8. The present movant, The Student Association of the State University of New York, Inc. ("SASU"), is an organization purporting to represent "the interests of 390,000 students of the State University [of New York] system." On June 1, 1995, counsel for respondents declined to consent to SASU's filing of a brief *amicus curiae* in support of the petition for a writ of certiorari.

Reasons for Denying the Motion

As fully demonstrated by the arguments in respondents' brief in opposition to the petition for certiorari, this case long ago passed the point at which it was of interest to current SUNY students, or indeed to anyone but plaintiffs' attorneys. The departure of plaintiffs, former SUNY students, from the SUNY system left them with no stake in the outcome of the litigation and, as the two courts below recognized, renders the case moot.

Thus, SASU's efforts to premise its interest in the case on "the underlying issue[s]" (*Amicus* Brief, p 2) are wrongheaded, for those issues are no longer before this Court. The only issue on which the petition for certiorari is based is the entitlement of plaintiffs to continue a case in which they no longer have an active interest. SASU can demonstrate no particular immediate concern with the present case on behalf of SUNY students.

SASU's sole argument supporting its motion (*Amicus* Brief, p 7) is the claim that the decision below will adversely affect the "future efforts" of "students in public colleges and universities" to "secure competent counsel." This argument, which does nothing more than echo that made by plaintiffs on the present petition, is fully addressed by respondents in their brief (pp 22-23). To summarize this argument: This case has nothing to do with the recoverability of attorney's fees under 42 USC § 1988 in civil rights actions brought by students pursuant to 42 USC § 1983. The mechanism of a class action is available to avoid the foreseeable mootness of such cases when plaintiffs graduate from or otherwise depart the defendant institutions. The simple procedural expedient of amendment of the complaint pursuant to Fed R Civ P 15 to add new student plaintiffs while the controversy remains live is likewise available, and indeed was once employed by counsel for plaintiffs in the present litigation. Whether plaintiffs' failure to take the steps necessary to guarantee a continuing live controversy is attributable to strategy or oversight, this failure hardly imperils the entitlement to attorney's fees in a correctly-conducted litigation. Thus, the interest of *amicus* in the continued availability of attorney's fees is not implicated by this case.

Indeed, the absence of any genuine interest of *amicus* in this case in its present posture is conclusively demonstrated by the fact that any of the 390,000 students supposedly represented by SASU could commence today an action substantively identical to the present case and, by employing the simple and universally-recognized procedural expedients discussed above, be assured of recovering attorney's fees in the event of prevailing on the merits. The fact that, in the present action, a small group of former SUNY students permitted their case to become moot, has no bearing on the rights either of current SUNY students to commence civil rights actions against SUNY or of

their attorneys to recover counsel fees in appropriate cases. Accordingly, SASU has no interest justifying a grant of *amicus curiae* status in the case at bar.

CONCLUSION

The motion for leave to file a brief *amicus curiae* should be denied.

Dated: Albany, New York
June 12, 1995

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondents

VICTORIA A. GRAFFEO
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel